80-1053

Supreme Court, U. S.
FILED
DEC 26 1980
MICHAEL RODAK, JR., CLERK

NO. 80-1053

in the

Supreme Court

of the

United States

JACK V. QUICK,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Whether the Trial Court erred in failing to instruct the Jury on the essential elements of the crime of conspiracy to possess marijuana with intent to distribute.

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JACK V. QUICK,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCIUT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on November 7, 1980.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed at _____ F.2d _____ and is printed in the Appendix.

JURISDICTION

The ju 'gment of the United States Court of Appeals for the Fifth Circuit was entered on November 7, 1980. The jurisdiction of this Court is invoked under 28 USC 1254.

STATEMENT OF THE CASE

Petitioner was indicted on July 31, 1979. Convictions were returned by the Jury on numerous offenses including Conspiracy to Possess with Intent to Distribute Marijuana. An Appeal was taken to the Fifth Circuit Court of Appeals. Petitioner's convictions were affirmed by said Appellate court by decision rendered November 7, 1980. This Petition for Writ of Certiorari in the United States Supreme Court follows:

STATEMENT OF THE FACTS

The facts which are required for this Court's understanding of the questions presented in this Petition for Writ of Certiorari are that the Petitioner was charged and convicted of Conspiracy to Possess Marijuana with Intent to Distribute. At the time of charging the Jury, the Trial Court failed to instruct as the elements of the underlying offense upon which the Conspiracy was based; to wit: possession of marijuana with intent to distribute. Since the validity of said instruction is the sole issue presented before this Court, further facts need not be set forth. However, additional facts are contained in the opinion of the Fifth Circuit Court of Appeals decision rendered below and incorporated herein by reference. See Appendix.

ARGUMENT

I

The Defendant was charged and convicted, along with other charges, with Conspiracy to Possess Marijuana with Intent to Distribute. In the Jury instructions, the Trial Court failed to instruct as the elements of the underlying substantive offense, possession of marijuana with intent to distribute. Rather, the only instructions which were given by the District Court were as follows:

> What is charged now in Count Three is that the defendant, Mr. Quick, together with others conspired to knowingly and intentionally possess with intent to distribute approximately a thousand pounds of marijuana. That's what is charged in court Three of the indictment . . .
>
> * * * * *
>
> What is charged here is that the defendant, Mr. Quick, in conspiracy with others, conspired to knowingly and intentionally possess with intent to distribute, with intent to sell or give

away, distribute in some way, one thousand pounds of marijuana in violation of this statute . . .

* * * * *

He is charged with conspiring with others to possess a thousand pounds of marijuana with intent to distribute it.

* * * * *

What the evidence there, with regard to Count Three, must show before you find the defendant guilty is: One, two or more persons in some way or manner came to a mutual understanding to try to accomplish a common unlawful plan to possess marijuana for the purpose of distributing it. That's what the evidence must show . . .

Thus, the Court instructed the Jury that the Defendant was charged with Conspiracy to Knowingly and Intentionally Possess with Intent to Distribute Marijuana, but never instructed the Jury as to the legal definition of possession with marijuana with intent to distribute.

It is generally accepted that the failure of the Trial Court to instruct the Jury as to the definition of the underlying conspiracy is reversible error. The Jury must be instructed on all of the essential elements.

"Failure of the Trial Court to instruct the Jury on the elements of the substantive crimes

> constituting the objects of the charge conspiracy, i.e. (1) to import marijuana and (2) to possess same with intent to distribute. There is nothing in the charge to the Jury which apprise them of the definition, character or nature of the acts of importing, possessing, or distributing marijuana. Moreover, the Trial Judge omitted any reference to the substantive crime of possessing with intent to distribute marijuana, one of the objects of the charge conspiracy. Only once, during the entire charge, did the Court attempt to inform the Jury of the crime with which appellants were charged, when it instructed: "You, the Jury, determined from all the facts and circumstances whether or not a criminal conspiracy existed between these two persons and others to import marijuana from Mexico into the United States."

United States vs. Martinez, 496 F.2d 664 (5th Circuit 1974).

Thus, it is reversible error to fail to instruct the Jury as to the legal definition of possession and possession with intent to distribute marijuana when it forms the underlying objects of the conspiracy charged. This is not a case as in *United States vs. Beasley*, 519 F.2d 233 (5th Circuit 1975), wherein the legal definition of the underlying conspiracy has previously been charged to the Jury as part of separate substantive offenses. The record in the case of Bar fails to reveal any instructions as to the legal definition of possession or possession with intent to distribute marijuana. Nor is this a case as in *United States vs. Febre*, 425 F.2d 107 (2nd Circuit 1969), wherein the Jury is specifically charged as to the

underlying statutory offense upon which the conspiracy is based and said underlying statute is read to the Jury.

Rather, this is a case where no legal definitions of any substantive related offense nor statutes were read to the Jury. The sole instructions as to the definition of the underlying object of the conspiracy was that the Defendant together with others "conspired to knowingly and intentionally possess with intent to distribute . . . marijuana.

In the absence of reference to particular statutory offenses or definitions of related substantive offenses, said mere instruction without including the legal definition of possession and possession with intent to distribute marijuana is insufficient as a matter of law. See *United States vs. Martinez, supra.*

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

BY: _____

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Appendix

Opinion of the Fifth Circuit Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5729
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK VERNON QUICK,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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(NOVEMBER 7, 1980)

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

PER CURIAM:

Appellant Jack Vernon Quick was charged in a six count indictment for kidnapping, drug conspiracy, and Travel Act violations. The jury acquitted Quick on the kidnapping charges, but convicted him on the conspiracy to possess marijuana for distribution charge, 21 U.S.C. §846, and the three Travel Act charges, 18 U.S.C. §1952. The trial court entered judgment on the verdict,

sentencing Quick to five years on the drug conspiracy count, with a two year term of special parole, and to concurrent five year terms on the Travel Act counts.[1] Although he does not contest the sufficiency of the evidence as to the drug conspiracy charge, Quick argues that the evidence was insufficient to establish the Travel Act violations, specifically that he travelled in interstate commerce or used a telephone in interstate commerce to facilitate the marijuana conspiracy. Quick also contends that the trial court's instructions were plainly erroneous as to the essential elements of the offenses involved. We affirm.

Facts

The evidence adduced in the trial below revealed that in August of 1978 Quick and Patrick Robinson discussed the possibility of making money be selling marijuana. Robinson informed Quick that he knew of someone, Jim Ricks, who had three thousand pounds of marijuana for sale. Quick told Robinson that he would be able to raise a large sum of money for such a deal.

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[1]In Bifulco v. United States, ___U.S. ___, 100 S.Ct. 2247 (1980), the Supreme Court held that §406 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §846, does not authorize the imposition of a special parole term even though that sanction is included within the penalty provision of §401(a) of the Act, 21 U.S.C. §841(a). Since appellant was convicted of conspiracy to possess marijuana for distribution in violation of 21 U.S.C. §846 and was sentenced to five years imprisonment with a two year period of special parole, we note that he may move the district court to correct his sentence as being illegal under Fed. R. Crim. P. 35(a).

Thereafter, a sale of one thousand pounds of marijuana was negotiated between Robinson and Ricks for a price of $150,000 with $68,500 to be paid on delivery as a partial down payment. In his efforts to raise the $68,500, Quick borrowed $30,000 from Walker Register, a father of a friend, under the pretext of needing it for a real estate deal. He borrowed another $1,500 from Robert Withers and collected the rest from a group of investors, including Matt Madson, James Irvin and Jerry Anderson.

The deal was to take place on August 17, 1978. On that day, Madson, acting for the buyers, gave the money to Ricks in Thomasville, Georgia. Ricks told Madson the marijuana was coming by truck and that he would contact him when it arrived. Madson left with Carl Roberts, an associate of Ricks, and waited along with the other buyers at a house near Tallahassee, Florida. Ricks telephoned that evening and told the buyers that the marijuana could be picked up at an abandoned welcome station between Monticello, Florida and Thomasville, Georgia. When Madson and Roberts arrived at the designated location, they found no one and no marijuana. They drove as far north as Thomasville looking for Ricks and the marijuana, but they were unsuccessful and returned to the house in Florida where Quick, Anderson and Irvin were waiting.

When Irvin learned that the money had been lost, he threatened to kill Roberts. Quick interceded and took Roberts to his farm in Florida. Quick told Roberts that he wasn't going to get out of Quick's sight until they recovered their money or received the marijuana. Once at Quick's farm he and Roberts both made a number of phone calls in a vain attempt to locate Ricks

or the marijuana. The next day, Quick drove Roberts back into Georgia looking for Ricks. They were again unsuccessful. Subsequently, Roberts was allowed to leave. Some weeks later Quick hired a private investigator to locate Ricks. The investigator revealed the marijuana conspiracy to the FBI. When confronted by the FBI, Quick signed a waiver after being advised of his rights and admitted his part in the scheme.

Sufficiency of the Evidence

Quick first argues there was insufficient evidence that he violated the Travel Act because there was no evidence that he possessed any marijuana. This argument is without merit. The Travel Act, 18 U.S.C. §1952(a), clearly prohibits interstate travel or the use of any facility in interstate commerce to commit any crime or unlawful activity, or any *attempt* to do the same.[2] "Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a

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[2]18 U.S.C. §1952 provides in pertinent part:

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

Footnote (continued)

> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs *or attempts to perform* any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. (Emphasis added.)

necessary element of the offense defined in section 1952." United States v. Pomponio, 511 F.2d 953, 957 (4th Cir.), *cert. denied*, 423 U.S. 874 (1975); *accord*, United States v. Lisner, 524 F.2d 1263, 1264 (5th Cir. 1975) (§1952 "does not require that an accused be successful at gambling in order to be found guilty of having travelled interstate in the business of gambling"). *Cf.* United States v. Villarreal, 546 F.2d 1145, 1146 (5th Cir.), *cert. denied*, 431 U.S. 917 (1977) (because success is not an essential element for a conspiracy conviction, court upheld conviction for conspiracy to possess heroin for distribution where conspirators were unable to obtain the heroin).[3]

[3]Quick's argument that a completed offense must be shown relies primarily on United States v. Leslie, 411 F.Supp. 215 (D.

Footnote (continued)

Del. 1976), which interpreted 21 U.S.C. §843(b) (prohibiting use of a communication facility to facilitate a drug conspiracy). *Leslie* held that even though a telephone was used in an attempt to facilitate the possession and distribution of a controlled substance, in order to obtain a conviction under §843(b) the felony alleged to be facilitated must have reached fruition. However, §843(b), unlike §1952, does not expressly cover *attempts* to violate the law. Notwithstanding that distinction, the district court's view in *Leslie* has been repudiated by its own circuit, United States v. Pierorazio, 578 F.2d 48, 51 (3d Cir), *cert. denied*, 439 U.S. 981 (1978), and has likewise been rejected by other circuits to have considered the question. *See* United States v. Watson, 594 F.2d 1330, 1343 (10th Cir. 1979), *cert. denied*, ____U.S.____, 100 S.Ct. 206 (1979). United States v. Gomec-Tostado, 597 F.2d 170, 173 (9th Cir. 1979).

With respect to sufficiency of evidence challenges, we must view the evidence adduced at trial and all reasonable inferences therefrom in the light most favorable to the government. United States v. Hawkins, 614 F.2d 85, 87 (5th Cir. 1980), (citing Glasser v. United States, 315 U.S. 60, 80 (1942)). "All reasonable inferences and credibility choices must be made in support of the jury verdict." United States v. De Jean, 613 F.2d 1356, 1358 (5th Cir. 1980). If, when examined in that light, the evidence is sufficient so that a jury might reasonably conclude it is inconsistent with the hypothesis of the defendant's innocence, then the jury's verdict of guilty must stand. *Hawkins*, 614 F.2d at 87.

In count four of the indictment, Quick was charged with using the telephone from his house in Tallahassee, Florida to communicate with Walker Register in Adel, Georgia in order to raise money for the marijuana purchase. Register testified that he had received two

or three telephone calls from Quick in August of 1978 regarding a loan of $30,000 for an alleged real estate deal. Register stated that at least one of these calls was made a day or two before the cashier's check for $30,000 was prepared. The check was dated August 17, 1978, and Quick's telephone records demonstrated that a call had been made from Quick's residence in Florida to Register's home in Georgia on August 16, 1978. Register gave Quick the cashier's check for $30,000, and through a series of transactions, Quick converted the check into cash, which was in turn given to Ricks on August 17. Under these circumstances, the evidence was sufficient to show that Quick used his telephone in interstate commerce to facilitate a drug conspiracy.

In count five, Quick was charged with travelling in interstate commerce from Tallahassee, Florida to Valdosta, Georgia to facilitate the marijuana conspiracy. This count was based on the trip Quick made on August 18 in an attempt to locate Ricks or the marijuana. Quick argues that the evidence is insufficient to support his conviction on this count for two reasons: (1) because the trip was not taken to promote a "business enterprise," which §1952 requires, and (2) because the trip was undertaken without intent to further the marijuana conspiracy, but merely in an attempt to recover his money.

Section 1952(b)(1) defines "unlawful activity" to include "any business enterprise involving . . . controlled substances . . . ." Therefore, in order to sustain a conviction under §1952(a) when the "unlawful activity" furthered by interstate travel is one enumerated in §1952(b)(1), the government must prove a connection between the offense and an ongoing "business enterprise." United

States v. Gooding, 473 F.2d 425, 427 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973). If the underlying offense involves controlled substances, the proof must show that the defendant acted with the intent to further something more than an isolated illegal incident. United States v. Wander, 601 F.2d 1251, 1257 (3d Cir. 1979). However, the proof need not establish that the illegal objective was accomplished. *United States v. Pomponio*, 511 F.2d. at 957. The evidence herein showed that Quick was instrumental in bringing together several investors, raising nearly $70,000 in capital, for the purchase of a half ton of marijuana. Clearly, Quick and his cohorts did not intend to buy this quantity of marijuana for personal use, or for an isolated illegal transaction. The only plausible inference is that they intended the half ton of marijuana to be the inventory for a large-scale retail enterprise. *See, e.g.*, United States v. Love, 599 F.2d 107, 109 (5th Cir.), *cert. denied*, _____ U.S. _____, 100 S.Ct. 302 (1979). That the attempt to purchase the marijuana was only the first step in this enterprise and, as it turned out, the last, cannot obscure the obvious fact that a business enterprise was begun. We hold this proof met the statutory requirement.

As to the second prong of Quick's argument challenging the sufficiency of the evidence to support the guilty verdict on the fifth count, *i.e.*, a lack of criminal intent, the evidence establishes that at the time of the trip Quick was motivated, at least in part by a desire to locate the missing marijuana.[4] This is

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[4]The evidence shows that after Ricks failed to deliver the marijuana on August 17, Quick told Roberts (Ricks' associate),

Footnote (continued)

"You are not going to get out of my sight until we get the money back or we get the marijuana." Furthermore, Roberts testified that prior to the time when he made numerous phone calls from Quick's residence on the 17th, Robinson told him, "I was . . . to make all the phone calls I could and try to find out what happened in this situation and we were going to find the marijuana or the money." This evidence is sufficient to establish that Quick's interstate travel on the 18th and the phone calls his coconspirator, Robinson, caused to be made the night before were motivated at least in part by a desire to find the marijuana.

sufficient to establish his intent to further an unlawful activity. United States v. Tilton, 610 F.2d 302, 308 (5th Cir. 1980).

In count six of the indictment, Quick was charged with using or causing to be used a telephone in interstate commerce to facilitate unlawful activity. This count refers to phone calls made by Roberts, from Quick's residence in Valdosta, Georgia, in an effort to locate Ricks after the marijuana was not delivered. The evidence shows that after the aborted delivery of the marijuana, Quick took Roberts to his farm in Florida and told him to talk to Robinson. Robinson then told Roberts to make telephone calls to all persons who might know Ricks' whereabouts. Roberts, who had earlier been threatened, complied with those instructions. Quick does not challenge the sufficiency of the evidence to support his conviction on the marijuana conspiracy charge, and as a coconspirator, he is, therefore, liable for the acts of his coconspirators in furtherance of the conspiracy. *Tilton*, 610 F.2d at 309, (citing Pinkerton v. United States, 328 U.S. 640 (1946)). *See* United

States v. Perrin, 580 F.2d 730, 736 (5th Cir. 1978), *aff'd*, _____ U.S. _____, 100 S.Ct. 311 (1979). We hold the jury's verdict is supported by sufficient evidence to sustain Quick's conviction on count six.

Jury Instructions

Quick contends that the district court erred in its instructions on the charge of conspiracy to possess marijuana with intent to distribute because it failed to enumerate the elements of the underlying substantive offense.[5] Because Quick failed to object to the court's charge, we review his claim under the plain error standard. Fed. R. Crim. P. 52(b).

We hold that the trial court's instructions were not plainly erroneous. Essentially the same contention as Quick makes here has already been rejected by this court on two prior occasions. United States v. Metz, 608 F.2d 147, 158 (5th Cir. 1979); United States v. Marino, 562 F.2d 941, 945 (5th Cir. 1977), *cert. denied*, _ U.S. _, 98 S.Ct. 1647 (1978). The charge fairly informed the jury of the elements of possession of marijuana with intent to sell or otherwise distribute. "[A]lthough a more detailed definition of the substantive crime underlying the conspiracy might have been desirable," *Metz*, 608 F.2d at 158, Quick has made no showing that a more detailed instruction would have aided the jury in assessing his

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[5]The district court instructed the jury in pertinent part as follows:

> [W]hat is charged now in Count Three is that the defendant, Mr. Quick, together with others conspired to

Footnote (continued)

> knowingly and intentionally possess with intent to distribute approximately a thousand pounds of marijuana. That's what is charged in court Three of the indictment . . . .
>
> * * *
>
> What is charged here is that the defendant, Mr. Quick, in conspiracy with others, conspired to knowingly and intentionally possess with intent to distribute, with intent to sell or give away, distribute in some way, one thousand pounds of marijuana in violation of this statute . . . .
>
> * * *
>
> He is charged with conspiring with others to possess a thousand pounds of marijuana with intent to distribute it.
>
> * * *
>
> What the evidence there, with regard to Count Three, must show before you find the defendant guilty is: One, two or more persons in some way or manner came to a mutual understanding to try to accomplish a common unlawful plan to possess marijuana for the purpose of distributing it. That's what the evidence must show . . .

role in the conspiracy. Under the circumstances, the charge was adequate. Read as a whole, it adequately instructed the jury as to the definition, character and nature of the acts that the conspiracy was designed to achieve.

Quick's final contention relates to the trial court's instructions on counts four and five of the indictment — the Travel Act violations dealing with Quick's interstate

telephone call to borrow $30,000 and with his trip on August 18 from Tallahassee, Florida to Valdosta, Georgia. Quick argues that the court's charge with respect to these two counts was erroneous because it failed to inform the jury that conviction under §1952 required proof that he performed or attempted to perform some overt act, after the interestate travel or communication, in furtherance of the marijuana conspiracy.[6] Again, because there was no objection to the charge, we are governed by the plain error standard.

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[6]There are three elements to a violation under §1952(a)(3): (1) interstate travel or communication through an interstate facility; (2) with intent to promote, manage, establish, carry on, or facilitate the promotion, etc. of an unlawful activity enumerated in §1952(b); and (3) thereafter performing or attempting to perform the promotion of an unlawful activity.

With respect to count four, the district court charged the jury in part:

> What the evidence has to show there is that he did use the telephone as alleged, and that he did it for this purpose of furthering this illegal activity. That's what the evidence has to show, those two things, before you would be authorized to find him guilty on Count Four.

With respect to count five, the court charged the jury in part:

> What the evidence has to show there before you can find him guilty is that he did travel from Florida into Georgia with the intention of promoting this alleged illegal activity and that he did so knowingly and purposely with intent to do so.
>
> Those things.

An overt act in furtherance of the illegal activity subsequent to an incident of interstate travel or communication is an essential element of a Travel Act violation. United States v. Hedge, 462 F.2d 220, 223 (5th Cir. 1972). The requirement of such an overt act was communicated to the jury by the trial court during its instructions, in that the relevant portions of the indictment and §1952 were read to the jurors. Therefore, when the court's charge is read as a whole, it is apparent that this element was included. Although the charge did not fully emphasize the third element of a Travel Act violation, we hold it to be adequate under the plain error standard.

AFFIRMED.